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In the  
**Supreme Court  
of the United States**

October Term, 1983

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THE STATE OF IDAHO, on relation of MARJORIE  
RUTH MOON, State Treasurer of the State of Idaho,  
*Petitioner,*

vs.

STATE BOARD OF EXAMINERS, and the  
Legislature of the State of Idaho, by and through  
THOMAS W. STIVERS, Speaker of the House, and  
JAMES E. RISCH, President Pro-Tem of the Senate,  
*Respondents.*

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**REPLY BRIEF FOR  
PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF IDAHO**

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STATEMENT OF CASE

Marjorie Ruth Moon, State Treasurer of the State of Idaho, (hereinafter called Petitioner) has timely filed her Petition for a writ of certiorari to issue to review the judgment of the Supreme Court of Idaho. Respondent has filed a response, contending: 1. no federal question was decided below; 2. the underlying federal question was not significant.

REASONS FOR GRANTING PETITION FOR  
WRIT OF CERTIORARI

I

Federal Question Was Decided By  
The Idaho Supreme Court

The state district court in its memorandum decision found specifically I.C. §57-724 violated the terms of the trust agreement with the United States and the provision of the State Constitution:

"This legislatively authorized use of the Fund's assets is clearly not in furtherance of any educational purpose and is therefore incompatible with the terms of the trust agreement with the United States and contrary to the will of the people of Idaho as expressed in their Constitution."

(see App. B, p. 30)<sup>1</sup>

The Idaho Supreme Court recognized in its opinion that:

"The public school endowment fund is a trust, the principal of which is derived primarily from the sale or lease of lands designated exclusively for school purposes. Idaho's admission to the federal Union was conditioned upon the creation of a permanent school fund. Idaho accepted this condition of admission to the union by enacting Article 9, §3 of the Idaho Constitution." (App. A. P. 4a)

The court's holding that there was no violation of Article 9, §3, Idaho Constitution, was a clear declara-

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<sup>1</sup> App. refers to the appendix of the Petition for Writ of Certiorari filed in this case.

tion there was no violation of the trust conditions with the United States. It was in effect an interpretation of a federal condition for the admission of Idaho as a State. The Idaho Supreme Court also recognized this in its opinion when it quoted *United States v. Fenton*, 27 Supp. 816 (D. Idaho 1939) as follows:

" 'The express purpose of the Admission Act and the State Constitution is to protect and hold inviolate and intact the fund from the Acts of the Legislature or acts or failures of the officers of the State.' 27 F.Supp. at 818." (App. A, p.5a)

The United States Supreme Court makes its own independent decision whether there was sufficient presentation of a federal question. *Street v. New York*, 394 U.S. 576, 584 (1969). The controlling principle is set forth in *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) where the court states:

"There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

Considering the record as a whole, respondent's argument that the Idaho Supreme Court did not pass on any federal question is incorrect. The Supplemental Complaint (App. D, pp.34a-39a) clearly alleges in Paragraph XIII (App. D, p.38a):

"The failure of \* \* \* the Legislature \* \* \* to supply said losses constitutes a breach of said contract, and constitutes a violation of the Idaho Admission Act and the United States Constitution."

The trial court and The Idaho Supreme Court both considered specifically and by clear intentment whether the contract (Trust) with the United States was breached.

## II

### The Federal Questions Presented Are Important

The federal questions presented by Petitioner are important. Reviewing state legislation that attempts to alter the trust conditions of a state's admission act for its own benefit is a matter of serious concern. The Court in *Ervien v. United States*, 251 U.S. 41, 45-48 (1919) did examine the use of funds by a state which was not in accord with its grant.

In *Ervien*, the Court found the state law was a breach of trust, even though the district court was of the opinion a private proprietor would use trust funds to advertise public lands for sale, and such a wise administration could not be a breach of trust. There were good policy reasons for the *Ervien* decision, as was stated in *United States v. New Mexico*, 536 F.2d 1324 (10 Cir. 1976):

"Because of previous abuses of federal lands granted in trust to the states, the Court observed that it had been Congress' intent 'to preclude any license of construction or liberties of inference'

when construing the Enabling Act. *Ervien v. United States*, *supra*, at 47, 40 S.Ct. at 76."

Respondents contend that interest "gains" were not part of Trust *res* and thus not subject to being left intact. This contention relates to merits of the case and not to whether the federal questions presented are important. It also ignores the plain language in the Idaho Admission Act (App. E, pp. 50a-52a) which makes clear that the proceeds are to be "used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said state." (App. E, p. 52a)

Investment gains are either principal or interest. If principal, they become part of the Trust *res*. Principal gains must under the Admission Act and/or State Constitution, be kept intact and inviolate, and used for the benefit of the beneficiaries, not the state. If investment gains are labeled as interest gains, then they must be used for support of the common schools, not to make up losses the state has solemnly promised to supply.

Respondents' contention that beneficiaries might benefit more if the state did not supply the losses is pure speculation. There is no great predictability in investments, and what investment *might* yield a higher long range profit may be hard to ascertain. However, whatever course the state takes in investments, it has solemnly promised to supply all losses. To allow the state by its law to amend the Admission Act and its own Constitution to say the beneficiaries will make up the losses is unconscionable, as well as a breach of federal trust conditions.

## CONCLUSION

The Court should grant the petition for a writ of certiorari. The record as a whole shows the federal claim of invalidity of the state law and the ground for such were brought to the attention of the state court with fair precision and in due time.

The federal questions are important because a violation of trust conditions by a state for its own benefit is a matter of grave concern. The *Ervien* case, and its progeny, are clear precedents, that the state shall use its school fund exclusively for education and not to meet the state's duty to supply all losses.

Dated November 16, 1983.

Respectfully Submitted,

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